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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-814

DONALD WALLACE, *et al.*,

Petitioners,

against

MICHAEL KERN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR STATE RESPONDENTS IN OPPOSITION

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State Respondents
Two World Trade Center
New York, New York 10047
Tel. (212) 488-7590

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARGERY EVANS REIFLER
Assistant Attorney General
of Counsel

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR STATE RESPONDENTS IN OPPOSITION

The State respondents oppose the petition for certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, dated June 30, 1975, which reversed an order of the United States District Court for the Eastern District of New York, dated March 25, 1975, which mandated bail procedures to be used by the Criminal and Supreme Courts of Kings County.

Opinion Below

The opinion of the Court of Appeals is reported at 520 F. 2d 400 and appears in the appendix to the petition at 1a-20a. The opinion of the District Court is unreported and appears in the appendix to the petition at 21a-87a. The order of the District Court is unreported and is reproduced at 88a-92a of the appendix to the petition.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1975. A timely petition for rehearing was denied on September 9, 1975. The petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Question Presented

Does the decision of the Court of Appeals, which is fully consistent with prior decisions of this Court, present any substantial federal question which warrants the exercise of this Court's certiorari jurisdiction?

Statement of the Case

A. Prior Proceedings

This petition concerns the last portion of a tripartite attempt "to enlist the help of the federal courts in making the state criminal justice system work better." (District Court Opinion at 23a). The action was commenced in July, 1972 by seven pre-trial detainees in Kings County, on behalf of themselves and all others detained pending trial on felony indictments in Kings County. The complaint, twice amended, sought broadscale reform of various pretrial practices in the county. Named defendants included Kings County Criminal and Supreme Court judges, the District Attorney, various New York City officials, and the Legal Aid Society.

In *Wallace I* (*Wallace* v. *Kern,* 392 F. Supp. 834 [E.D.N.Y.], *reversed,* 481 F. 2d 621 (2d Cir. 1973), *cert. den.* 414 U.S. 1135 [1974]), the District Court preliminarily ordered, *inter alia,* that the Legal Aid Society not accept cases beyond a specified maximum caseload per attorney and that the Supreme Court Clerk calendar *pro se* motions. The Court of Appeals reversed, holding that it had no jurisdiction over the Legal Aid Society and that "under the principle of comity, a federal court has no

power to intervene in the internal procedures of the state courts." 481 F. 2d at 622. This Court denied the petition for certiorari. 414 U.S. 1135.

In *Wallace II* (*Wallace* v. *Kern,* 371 F. Supp. 1384 [E.D.N.Y.], *reversed,* 499 F. 2d 1345 [2d Cir. 1974], *cert. den.* 420 U.S. 947 [1975]), the District Court found that the right of the class to speedy trials was being denied and imposed its own rule as to when trials must be held or else release on recognizance granted. Again, the Court of Appeals reversed, holding that this wholesale relief failed to account for the individual balancing test set forth by this Court in *Barker* v. *Wingo,* 407 U.S. 514 (1972). The Court said:

> "This is not the proper business of the federal courts, which have no supervisory authority over the state courts and have no power to establish rules of practice for the state courts. Rather, the federal courts must limit their inquiry to the specific facts regarding a complaining petitioner. Relief from unconstitutional delays in criminal trials is not available in wholesale lots. Whether an individual has been denied his right to a speedy trial must be determined ad hoc on a case-by-case basis." 499 F. 2d at 1351.

The petition for certiorari was denied. 420 U.S. 947.

B. Wallace III

The third portion of this action (*Wallace III*) concerned a broadscale attack on the bail system as operated in Kings County. A seven day plenary trial was held before the District Court. The District Court found that the Kings County bail system operated in violation of petitioners' rights under the Eighth and Fourteenth Amendments to the United States Constitution. (Opinion 21a-87a).

The final order of the Court granted petitioners declaratory and permanent injunctive relief, mandating the bail procedures to be used in Kings County (88a-92a). The

Court ordered 1) that pretrial detainees be afforded an evidentiary bail hearing at which the prosecution shall recommend the form of security necessary to assure the defendant's future appearance; 2) that the prosecution have the burden of proving the need for monetary bail if that form is recommended and shall state why alternative forms are not sufficient; 3) that the hearing be held at the request of the pretrail detainee at any time after 72 hours of arraignment or thereafter as new evidence or change in facts may require; 4) that sixty days pretrial incarceration be deemed a sufficient change in facts to warrant a *de novo* hearing; and 5) that the state court provide the defendant with a written statement of reasons for denying or fixing bail, including the facts relied upon, and that failure to provide such a statement entitles the defendant to a *de novo* bail hearing.*

The District Court rejected respondent's argument that principles of comity barred its interference with the state bail system (82a-84a). Relying on *Rhem* v. *Malcolm*, 507 F. 2d 333 (2d Cir. 1974), the Court stated that conditions of pretrial confinement are a proper subject of federal concern (82a). The Court distinguished *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Samuels* v. *Mackell*, 401 U.S. 66 (1971) on the ground that petitioners did not seek to enjoin pending criminal prosecutions.

C. Opinion Below

The Court of Appeals unanimously reversed the order of the District Court, sustaining respondents' position that principles of federalism, comity, and equity barred federal interference in the state's bail system. *Wallace III*, 520 F. 2d 400.

The Court squarely rejected the notion that the principles of comity and federalism underlying *Younger* v. *Harris*, 401 U.S. 37 (1971), applied only to those seeking to enjoin an ongoing criminal prosecution. 520 F. 2d at 405. With particular reference to recent decisions of this Court, the Court of Appeals held that it was interference with the state criminal process that was offensive to the doctrine of comity. *Id.* at 404-408.* Since the mandatory order of the District Court opened the door to ongoing interference with pending bail proceedings (*id.* at 405 n. 9, 406), undue federal intervention in that process was clear. Petitioners' reliance on *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), was discounted since *Gerstein* is clearly distinguishable factually and legally. 520 F. 2d at 406-408.

Finally, the Court found that the relief ordered by the District Court also violated the traditional principle of equity that a court of equity will not intervene when the movant has an adequate remedy at law. *Id.* at 406-408. Petitioners have such remedies provided to them by New York statutes, and there was no finding by the District Court that those remedies are constitutionally deficient. *Id.* at 407-409.

In reversing the order pursuant to *Younger* and its explication in recent cases of this Court, the Court of Appeals stated:

> "The order created an intrusion upon existing state criminal process which is fissiparous and gratuitous and it further ignores the prior rulings of this court on appeals in this case". *Id.* at 408.

While conscious of the District Court's concern for the conditions at issue in the case, the Court aptly noted that "we are not ombudsmen charged with the responsibility of reforming the state penal system." *Id.*

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* Certain other portions of the opinion and order (pars. 1, 5-11 at 88a-92a) were not challenged on appeal and are not before this Court. See *Wallace III*, 520 F. 2d 400, 403-404 n. 8.

* Since petitioners attacked custody allegedly resulting from unconstitutional bail practices, respondents argued below that they could proceed only via the federal habeas corpus statute, after exhausting their state remedies. This argument is not pursued herein since the Court of Appeals' decision recognized the comity principle underlying that contention. See, e.g., *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973).

Reasons for Denying the Petition for Certiorari

The decision of the Court of Appeals is entirely consistent with prior decisions of this Court and presents no substantial federal question which warrants review by this Court.

The decision of the Court of Appeals, holding that the mandated federal intervention in the state bail system violated well-established principles of comity and equity, was fully consistent with prior holdings of this Court. See, e.g., *Kugler* v. *Helfant,* 421 U.S. 11, 95 S. Ct. 1524 (1975); *Schlesinger* v. *Councilman,* 420 U.S. 738, 95 S. Ct. 1300 (1975); *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 95 S. Ct. 1200 (1975); *O'Shea* v. *Littleton,* 414 U.S. 486 (1974); *Younger* v. *Harris,* 401 U.S. 37 (1971). Petitioners erroneously characterize the decision as a radical departure from these decisions, raising the need for additional interpretation by this Court. In fact, the Court's decision was no more than a proper and thoughtful application of those decisions to a particular factual situation.

1. The Court of Appeals held that the wholesale reform of the Kings County bail system ordered by the District Court violated the principles of federalism and comity underlying *Younger* v. *Harris, supra.* As this Court recently reiterated in *Huffman* v. *Pursue, Ltd.,* 95 S. Ct. at 1206, *Younger* stemmed a long existing judicial policy against "federal interference with state criminal proceedings," which recognized the state courts' interest, duty, and competency in deciding questions of a federal constitutional nature and avoided needless conflict with a state's administration of its own criminal laws. See also *Schlesinger* v. *Councilman,* 95 S. Ct. at 1312; *O'Shea* v. *Littleton,* 414 U.S. at 500-502.

Petitioners sought and obtained from the District Court a massive reform of the Kings County bail system, by way of an injunction and declaratory judgment against judges

who are and will handle pending criminal proceedings in the state courts. By virtue of its order, minutely detailing the procedures to be used for setting bail, the District Court opened the door of the federal court to any pretrial detainee who claims that any portion of that order was violated, for example, that the People failed to sustain their burden of proof, that the hearing was not timely, or that the statement of reasons required was not given or was insufficient. See *Wallace III,* 520 F. 2d at 405 n. 9, 406.

This is exactly the type of "abrasive and unmanageable intercession" warned against by this Court in *O'Shea* v. *Littleton, supra.* There, as here, plaintiff did not seek to enjoin an actual trial but sought revision of state bail and sentencing procedures. In lengthy and strongly worded *dicta,* this Court rejected the lower court's suggestion that the state courts could be required to periodically report on their bail and sentencing actions. This Court said of such federal intervention:

> "This seems to us nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* v. *Harris, supra,* and related cases sought to prevent." 414 U.S. at 500. See also *id.* at 502.

The Court of Appeals herein stated, "[t]his is precisely the mischief created by the order below." *Wallace III,* 520 F. 2d at 406.*

Accordingly, the decision that principles of comity prevent federal interference with "the state criminal law en-

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* Plaintiffs' gratuitous suggestion (Petition at 13) that pretrial detainees would repair to the state courts in the event of noncompliance with the federal order is unsupported and belied by common knowledge of prisoners' preference for the federal courts. Indeed, if comity dictates that they proceed first in the state court on their noncompliance claims, then *per force* the instant action did not belong in a federal forum in the first instance.

forcement process" (*Huffman* v. *Pursue, Ltd.*, 95 S. Ct. at 1206) is fully consistent with this Court's holdings, as well as those of the lower courts.* It would be anomalous indeed, as the Court of Appeals stated, to extend *Younger* absention to certain state court civil actions in which the state has some concern (*Huffman* v. *Pursue, Ltd., supra*), yet hold its principles inapplicable to bail application proceedings in which the State of New York has a "most profound" and "prime" interest. *Wallace III*, 520 F. 2d at 405.

Petitioners' reliance on the failure to apply *Younger* v. *Harris, supra,* in this Court's recent decision in *Gerstein* v. *Pugh*, 420 U.S. 103, 108 n. 9, 95 S. Ct. 854, 860 n. 9 (1975), is misplaced since *Gerstein* is both factually and legally distinguishable from the instant case. See *Wallace III*, 520 F. 2d at 406-408. The *Younger* doctrine rests not only on the principle of comity but also on the traditional maxim that equity will not intervene when adequate remedies at law exist. At the outset of its opinion in *Gerstein*, this Court emphasized that the plaintiffs were without effective remedies through which they could pursue their claims (95 S. Ct. at 859), unlike the petitioners herein (*post* at 9). Accordingly, the *Younger* doctrine could not be applied to them, since they were without any other avenue of relief.

2. The Court of Appeals also held that the District Court's order violated the traditional equitable principle

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* *Wallace III* was certainly not the first federal decision applying the *Younger* principles to interference with the state criminal process, rather than an actual trial. E.g., *Wallace I and II; Cadena* v. *Peressa*, 498 F. 2d 383 (9th Cir. 1974); *Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F. 2d 12, 22 (2d Cir. 1971); *Leslie* v. *Matzin*, 450 F. 2d 310, 312 (2d Cir.), *cert. den.* 406 U.S. 932 (1972); *Harrington* v. *Arcenaux*, 367 F. Supp. 1268 (W.D.La. 1973); *Fowler* v. *Alexander*, 340 F. Supp. 168, 172-173 (M.D.N.C. 1972), *aff'd.* 478 F. 2d 694 (4th Cir. 1973); *McLucas* v. *Palmer*, 309 F. Supp. 1353 (D. Conn.), *aff'd.* 427 F. 2d 239 (2d Cir.), *cert. den.* 399 U.S. 937 (1970).

that equity will not intervene when there exist adequate remedies at law. Since petitioners failed to show that they were without such remedies, they were not entitled to injunctive relief. See, e.g., *O'Shea* v. *Littleton*, 414 U.S. at 502.

The Court of Appeals reiterated the legal avenues of relief open to New York pretrial detainees. *Wallace III*, 520 F. 2d at 407. These remedies (habeas corpus proceedings in the Supreme Court or the Appellate Division of the Supreme Court)* were not challenged in the instant action. The complaint challenged initial and subsequent bail applications, and the District Court's finding of constitutional infirmity was accordingly limited to those judicial proceedings. There is no merit to petitioners' contention that they need not pursue the state legal remedies available because they attack a "systematically unconstitutional procedure" affecting a class. Petition at 19. The New York state courts have used a solitary habeas corpus proceeding to establish new rights for a class of persons. E.g. *People ex rel. Menechino* v. *Warden*, 27 N Y 2d 376, 318 N.Y.S. 2d 449, 267 N.E. 2d 238 (1971). Cf. *Rivera* v. *Trimaro*, 36 N Y 2d 747, 368 N.Y.S. 2d 826, 329 N.E. 2d 661 (1975).

Finally, plaintiffs' argument that the Court of Appeals' decision offends the principle that exhaustion of state remedies is not required in an action brought pursuant to 42 U.S.C. § 1983 is frivolous. *Younger* abstention is a well-known exception to that rule, and it is established that the Civil Rights Act was never intended to abrogate the rule that equity will stay its hand when adequate

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* Additionally, an action for declaratory judgment was permitted in a case challenging New York County bail procedures. *Bellamy* v. *Judges & Justices*, 41 A D 2d 196, 342 N.Y.S. 2d 137 (1st Dept.), aff'd. 32 N Y 2d 886, 346 N.Y.S. 2d 812, 300 N.E. 2d 153, *remittur amd.*, 33 N Y 2d 632 (1973). *Bellamy*, of course, would not be binding on petitioners herein since they present a case predicated on facts different from those alleged in *Bellamy*.

remedies at law exist. E.g. *Appalachian Volunteers, Inc.* v. *Clark*, 432 F. 2d 530, 537 (6th Cir. 1970), *cert. den.* 401 U.S. 439 (1971); *Potwora* v. *Dillon*, 386 F. 2d 74, 77 (2d Cir. 1967). See *Allee* v. *Medrano*, 416 U.S. 802, 814 (1974). Accordingly no litigant with available remedies at law can obtain injunctive relief from a federal court.

Since the decision below was no more than a proper and consistent application of previously announced principles to a particular factual situation, no substantial federal question is presented for review by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: New York, New York, January , 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State Respondents

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARGERY EVANS REIFLER
Assistant Attorney General
of Counsel